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IN THE
Supreme Court of the United States

NORTH STAR ALASKA HOUSING CORP.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a party's bad faith misconduct outside of court proceedings categorically exempt from an award of attorneys' fees under the "bad faith exception" to the "American Rule" that each party ordinarily pays its own fees?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the North Star Alaska Housing Corporation. Pursuant to Rule 29.6, petitioner is not owned by any parent company, nor do any publicly held companies own 10% or more of the corporation's stock. Respondent, the United States, was defendant-appellee below.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. B, *infra*) is reported at 356 Fed. Appx. 415. The Court of Federal Claims decision (Pet. App. C, *infra*) denying petitioner's motion for attorneys' fees is reported at 85 Fed. Cl. 241. The Court of Federal Claims opinion on the merits of petitioner's underlying claims (Pet. App. E, *infra*) is reported at 76 Fed. Cl. 158.

JURISDICTION

The Federal Circuit entered its decision on December 15, 2009. Pet. App. 4a. The court of appeals denied petitioner's timely petition for

rehearing en banc on March 22, 2010. *Id.* 2a-3a. Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including July 20, 2010. App. 09A1194. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Access To Justice Act provides, in relevant part:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b).

Relevant portions of the Contract Disputes Act, 41 U.S.C. §§ 601-13, are reprinted at Pet. App. J, *infra*.

STATEMENT OF THE CASE

The government purposefully breached its contract with petitioner and refused to cure its default. Petitioner filed an administrative claim, as

required by federal law. The government then purposefully corrupted the claims-resolution process as well. As a result of this course of misconduct, petitioner was required to further pursue its remedies through an action in the Court of Federal Claims. The court found as a matter of fact that the government had acted in bad faith and ruled for petitioner on the merits of the majority of its claims.

Petitioner expended significant amounts in attorneys' fees. Petitioner moved to recover those fees based on the course of the government's bad faith conduct, which included not merely violating petitioner's rights (by breaching the contract), but also forcing petitioner to pursue the claims-resolution process both administratively (by refusing to cure the breach) and in court (by interfering with the claims process). The court recognized that several other courts of appeals would award petitioner its attorneys' fees in these circumstances. But it held that it was compelled by Federal Circuit precedent to reject petitioner's request because the government had not acted in bad faith in the court proceedings themselves. The court of appeals summarily affirmed and denied rehearing en banc.

1. In 1987, respondent United States contracted for petitioner North Star Alaska Housing Corporation to design, build, and maintain a housing project at Fort Wainwright, Alaska. Pet. App. 26a-27a. As subsequently found by the Court of Federal Claims, the United States engaged in a "prolonged campaign designed to harm North Star," through bad faith administration, poor performance, and efforts to interfere with petitioner's own performance of the contract. *Id.* 167a. The government thus pursued

and implemented its "own form of vigilante justice" and engaged in "pervasive" bad faith that "infected virtually every aspect of the administration of the Lease" and "fell far below the standard of good faith that is integral to the Federal procurement system." *Id.* 102a, 167a, 168a, 181a. Here, "bad faith plainly animated actions by key government officials that effectuated not only a breach of the covenant of good faith and fair dealing, but also many express contract provisions." *Id.* 106a.

The Contract Disputes Act, 41 U.S.C. §§ 601-13, as implemented by the Federal Acquisition Regulation System, 48 C.F.R. §§ 1.000-1.707 (2009), establishes the scheme that must be followed by a contractor which objects to the United States' contract performance. The contractor may not proceed immediately to court. Instead, it initially files an administrative "claim." The adjudicator of the claim in the first instance is the "contracting officer," 41 U.S.C. § 605(a), who is "responsible for ensuring performance of all necessary actions for effecting contracting, [and] ensuring compliance with the terms of the contract," 48 C.F.R. § 1.602-2. "The submission of a claim initiates the disputes process." John Cibinic, Jr. et al., *Administration of Government Contracts* 1252 (4th ed. 2006) (hereinafter "Cibinic et al.").

Petitioner filed a series of claims relating to the government's breach of the contract. But contrary to the contracting officer's duty to "[e]nsure that contractors receive impartial, fair, and equitable treatment," 48 C.F.R. § 1.602-2(b), the United States engaged in significant further misconduct designed to deprive petitioner of a fair adjudication of its claims.

See Pet. App. 157a-67a. As the Court of Federal Claims subsequently found, there is "clear proof" that the government "co-opted" the contracting officer who was responsible for ruling on petitioner's claims, conduct that the court characterized as "[a]mong the most troubling aspects of the case." *Id.* 157a.

Most broadly, the government "successful[ly]" "coerce[d the contracting officer] into abandoning his independence." *Id.* 164a. Army administrators repeatedly and inappropriately interjected themselves into contracting officer affairs. *Id.* 162a-63a. In addition, the Army enacted a "formal protocol . . . under which [Army staff] would review and comment on draft contracting officer decisions before they were finalized." *Id.* 162a. This process led the contracting officer to reverse at least one decision that would have held in petitioner's favor. *Id.* 163a. These actions "constituted perhaps the most pernicious form of bad faith . . . as it threatens the integrity of the dispute resolution process that is central to the government contracting system itself." *Id.* 160a.

Furthermore, "[a]pparently unsatisfied with disrupting the internal dispute mechanism, [Army officials] sought to wield other government processes to harass," including urging that petitioner be subjected to an audit by the Army's Internal Review and Audit Compliance Office. Tellingly, when this process "yielded little in the way of adverse findings," the Army nonetheless "pressed for, and obtained, a criminal investigation of the matter." *Id.* 166a. The Court of Federal Claims later concluded that this effort was, "disturbingly, . . . viewed as a way to

support the development of defenses in this litigation." *Id.* 166a n.71.

As a consequence of the government's gross misconduct, petitioner was required to seek further review of its claims in the Court of Federal Claims, *see* 41 U.S.C. § 609(a), where it filed four actions. Pet. App. 47a, 63a, 83a, 87a. Ultimately, petitioner's allegations were consolidated for an eight-day trial in 2005. *See* Pet. App. 87a-89a.

Petitioner prevailed on the majority of its claims, including specifically its allegations of breach of contract and breach of the covenant of good faith and fair dealing. *See id.* 106a. To this end, over the course of eighty-seven pages of its opinion, the court recounted the government's willful misconduct summarized above. *Id.* 167a.

The court granted petitioner substantial declaratory relief with respect to the government's breaches of contract. *Id.* 181a-82a. The court noted that it possessed limited jurisdiction to award monetary relief for certain of the claims, however, reasoning that the Contract Disputes Act's submission requirements had not been satisfied. *Id.* 89a-98a; *see id.* 179-80a. Moreover, the court rejected many of petitioner's damage calculations as "premature" because some damages, like those relating to incentive bonuses, "await[ed] further determinations on a remand." *Id.* 179a-80a.

Accordingly, the court's final judgment awarded approximately $250,000 in damages as compensation owed to North Star for incentive bonuses and certain breaches of contract. *Id.* 21a-22a. The court left it to the contracting officer to determine in the first

instance petitioner's additional damages based on the court's declaratory findings. In the subsequent proceedings, the government awarded North Star more than $1.6 million as further compensation for the government's breaches of contract. *Id.* 192a-264a; C.A. J.A. A0141-0142.

The United States did not appeal the findings that it had engaged in a pattern of gross bad faith misconduct in the administration of the contract and in the proceedings of the contracting officer, the declaratory findings, or the award of damages.

2. Petitioner timely moved in the Court of Federal Claims to recover its attorneys' fees. The Equal Access to Justice Act (EAJA) provides that the United States shall be liable for attorneys' fees in "any civil action brought by or against the United States . . . to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b). In turn, this Court has held under the "bad faith" exception to the "American Rule" that a federal court has the inherent power to hold a party liable for its opponent's attorneys' fees for acts done "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417

Preliminarily, the Court of Federal Claims rejected petitioner's assertion that attorneys of the Department of Justice had acted in bad faith in the proceedings before the court itself. Pet. App. 10a-13a. But it regarded as "a closer call" whether fees

should be awarded on the ground that the government had "corrupted the administrative process." *Id.* 13a. As to that allegation, the court reiterated that there was overwhelming evidence of the government's bad faith course of misconduct, continuing through both contract performance and the subsequent adjudication of petitioner's claims by the contracting officer. *Id.* 6a. That misconduct necessitated petitioner appealing to the Court of Federal Claims. Moreover, the court recognized that certain misconduct by the government was in defiance of rulings by the court itself. *Id.* 12a (quoting the court's merits opinion, Pet. App. 140a-41a).

The court nonetheless held that it was powerless to award petitioner attorneys' fees under existing Federal Circuit precedent adopting a "restrictive view of the 'bad faith' exception" to the American Rule. Pet. App. 17a. The court read the Federal Circuit's decision in *Centex Corp. v. United States*, 486 F.3d 1369 (Fed. Cir. 2007), to hold that bad faith by the government outside the context of federal court litigation – including in "how an agency handles an administrative claim," Pet. App. 18a – is exempt as a matter of law from an award of attorneys' fees under the EAJA. *Id.* 17a.

Although it was undisputed that the United States' misconduct had infected the dispute resolution process and necessitated the court proceedings, and despite the substantial declaratory relief granted which resulted in a total award approaching $2 million, the court noted that its prior denial of "much of the relief requested by" petitioner demonstrated that even if petitioner had received "a

perfectly fair process" before the claims administrator, much of its damages claim would have been denied. *Id.* 19a. On that basis, the court opined that "it is hardly true here that, but for the bad faith, plaintiff could have avoided this action and the significant expenditure of judicial resources it entailed." *Ibid.* Finally, the court noted that the government's misconduct could be characterized as an element of petitioner's claim that respondent "had breached its covenant of good faith and fair dealing." *Ibid.*

The court recognized that the Federal Circuit's precedent, and in turn the court's own decision in this case applying that precedent, conflicts with decisions of other circuits, which are "arrayed over a spectrum." *Id.* 14a. The Ninth and Eleventh Circuits, for example, "have no problem concluding that the 'bad faith' denial of a claim is sanctionable." *Id.* 14a-15a (citing *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326 (11th Cir. 2001) (per curiam); *Brown v. Sullivan*, 916 F.2d 492 (9th Cir. 1990)). In stark contrast, cases "[a]t the other end of the spectrum . . . , in more narrowly construing the sanctioning authority, conclude that fee shifting can never be based upon 'bad faith' conduct that solely predates the litigation." *Id.* 15a.

3. On petitioner's appeal, the government did not contest the Court of Federal Claims' findings that it had breached its contract with petitioner or that it had corrupted the proceedings of the contracting officer. The government instead asserted that the judgment should be affirmed because the outcome of the case was compelled by *Centex*, *supra*. According to the United States, in *Centex* the Federal Circuit

"acknowledged the existence of out-of-circuit authority 'for the proposition that the judicial process is abused by a defendant's bad faith response to a claim for relief after the claim accrues but before the judicial process is formally invoked,'" but "did not endorse that theory." Resp. C.A. Br. 10 (quoting *Centex*, 486 F.3d at 1372 n.1). The court of appeals summarily affirmed. Pet. App. 4a-5a.

Petitioner sought rehearing en banc, arguing that further review of the case was warranted in light of the acknowledged circuit conflict over whether and to what extent out-of-court misconduct is immune from an award of attorneys' fees. Ordered to respond, the United States argued that the question had already been properly settled in the Federal Circuit by *Centex*, *supra*. *See* Resp. C.A. Opp. to Rhg. En Banc 9 ("the trial court acted consistent with *Centex*, and, in affirming the trial court's order, this Court did not overlook or misapprehend any point of law"). The court denied rehearing en banc. Pet. App. 2a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The opinions of the Court of Federal Claims establish that the government engaged in a pervasive pattern of bad faith behavior in the administration of the parties' contract and in the adjudication of petitioner's claims before the contracting officer. The direct consequence of that serious misconduct was that petitioner instituted court proceedings seeking a fair adjudication of its claims. As a consequence, petitioner unnecessarily incurred significant attorneys' fees and the judiciary's time was spent on this matter unnecessarily. The lower courts

nonetheless concluded that petitioner was ineligible as a matter of law to receive an award of its attorneys' fees under the "bad faith" exception to the American Rule.

This Court's intervention to review that holding is warranted for three reasons. *First*, the question presented is the subject of a substantial circuit conflict. The courts of appeals are starkly divided into three camps over what circumstances, if any, justify an attorneys' fee award against a party for bad faith misconduct outside of proceedings before the court itself. *Second*, the ruling below conflicts with this Court's precedents. In this case, the United States purposefully engaged in an uninterrupted course of bad faith conduct that unjustifiably forced petitioner to incur significant attorneys' fees by pursuing its rights first through the administrative claims process and subsequently in court. This Court's decisions provide that an award of attorneys' fees may be available for bad faith misconduct that, as in this case, goes beyond merely the acts that give rise to the party's claim. *Third*, the importance of the case is undeniable. The question presented can arise with respect to any party in any litigation, whether or not involving the United States. Certiorari accordingly should be granted.

I. The Question Presented Is the Subject of a Three-Way Circuit Conflict.

a. The Federal Circuit affirmed the Court of Federal Claims' judgment that petitioner was precluded from securing an award of attorneys' fees because the government did not engage in bad faith misconduct before the court itself. Pet. App. 18a-20a.

That ruling is consistent with the precedent of the Third, Seventh, and Tenth Circuits, which similarly would have held that petitioner was ineligible as a matter of law to receive an award of attorneys' fees.

In *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d 385, 391 (7th Cir. 2002) (Posner, J.), the Seventh Circuit held that the bad faith exception to the American Rule "is a residual authority, to be exercised sparingly, to punish misconduct [] occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law—designed, for example, to deter breaches of contract)." The court of appeals took care "to repeat" that a party's "behavior in the litigation itself . . . is the only lawful domain" of such awards. *Ibid.* In the view of the Seventh Circuit, seeking to award fees more broadly would amount to the impermissible assertion of "a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American Rule on the award of attorneys' fees to the prevailing party in the absence of statute." *Id.* at 390-91.

That narrow view of the availability of an award of fees also comports with the precedent of the Tenth Circuit. In *FTC v. Kuykendall*, 466 F.3d 1149 (10th Cir. 2006), that court held that fees are available only on the basis of the claims and arguments made in litigation, and even then, "[i]n order to fall within the exceedingly narrow bad faith exception to the general rule, there must be clear evidence that the challenged

claim 'is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons.'" *Id.* at 1152 (quoting *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1201 (10th Cir. 2005)). *See also Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1317 (10th Cir. 2000).

Similarly, in *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3d Cir. 1982), Mobil unsuccessfully challenged an arbitration award, but the district court found that its litigating position before the court itself was reasonable. The Third Circuit held that its conduct was immune from an award of fees because the bad faith exception to the American Rule is limited to circumstances in which "the losing party litigated in bad faith, vexatiously, or for oppressive reasons. Thus, the issue before us is whether the district court abused its discretion in specifically finding that Mobil did not demonstrate bad faith in conducting this litigation." *Id.* at 305 (citation omitted).

b. The holding of the Federal, Third, Seventh, and Tenth Circuits that conduct outside court proceedings is exempt from an award of attorneys' fees squarely conflicts with decisions of the eight other circuits to have decided the question presented. The latter rulings themselves adopt two conflicting rules.

i. The D.C., Fourth, and Eleventh Circuits broadly hold that an award of attorneys' fees may be available for bad faith conduct that gives rise to a plaintiff's substantive claim that the defendant violated a clear duty. On the facts of this case, those courts would hold that the government's purposeful

misconduct in breaching its agreement with petitioner and further corrupting the statutorily defined claims-resolution process may give rise to an award of attorneys' fees.

The Court of Federal Claims in this case itself recognized that petitioner would be permitted to pursue attorneys' fees under the precedent of the D.C. Circuit, *see* Pet. App. 15a, but the Federal Circuit rejected the D.C. Circuit's position in *Centex*, *supra*, 486 F.3d at 1372-73. *See also Cobell v. Norton*, 407 F. Supp. 2d 140, 168 (D.D.C. 2005) (noting conflict between D.C. Circuit precedent and decisions of other circuits), *mandamus granted on unrelated question*, *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). In the D.C. Circuit, an award of attorneys' fees for bad faith is not limited to cases in which misconduct "occurred in connection with the litigation," but also is available independently if a party engages in bad faith acts that were "an aspect of the conduct giving rise to a lawsuit" when the litigant violated "a clear statutory or judicially-imposed duty." *Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219-20 (D.C. Cir. 1991) (Sentelle, J.). Attorneys' fees are thus available when "a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights." *Id.* at 220. For example, that court has awarded attorneys' fees when an agency issued a regulation that contradicted a prior stipulation, leading a party to seek to enjoin the regulation. *Ibid.* *See also Nepera Chem., Inc. v. Sea-Land Serv.*, 794 F.2d 688, 702 n.102 (D.C. Cir. 1986) (citing *Schlein v.*

Smith, 160 F.2d 22, 25 (D.C. Cir. 1947)); *American Employers Ins. Co. v. American Sec. Bank.*, 747 F.2d 1493, 1502 (D.C. Cir. 1984).

The District Court for the District of Columbia rigorously adheres to that standard. Thus, in *Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36 (D.D.C. 2004) (Kennedy, J.), the court awarded fees because the government's failure to follow statutory requirements in implementing the federal Medicare+Choice program made it necessary for the plaintiff to file suit. The court explained that the government "engaged in conduct that required plaintiffs to undertake otherwise unnecessary litigation to vindicate plain legal rights." *Id.* at 39. Similarly, in *Ellipso, Inc. v. Mann*, 594 F. Supp. 2d 40, 44 (D.D.C. 2009) (Lamberth, C.J.), the court awarded the defendant attorneys' fees arising from the plaintiff's filing of a lawsuit when "the key 'fact' that [the plaintiff] used to instigate this litigation was patently false." *See also, e.g., Am. Postal Workers' Union v. USPS*, No. 09-1217, 2010 U.S. Dist. LEXIS 46488 (D.D.C. May 12, 2010); *District of Columbia v. Straus*, No. 08-2075, 2010 U.S. Dist. LEXIS 35702 (D.D.C. Apr. 12, 2010).

The Eleventh Circuit has in turn expressly adopted the D.C. Circuit's standard. *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (per curiam) ("recogniz[ing] bad faith where 'a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights'" (quoting *Am. Hosp.*, 938 F.2d at 220)).

Similarly, the Fourth Circuit long ago adopted the rule that the defendant's primary conduct underlying the claim may itself give rise to an award of attorneys' fees. *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963) (school board's "long continued pattern of evasion and obstruction" to desegregation was "so extreme" as to justify shifting fees); *Rolax v. Atl. Coast Line R.R. Co.*, 186 F.2d 473 (4th Cir. 1951) (awarding attorneys' fees against labor organization that entered into racially discriminatory labor agreement). That court has continued to adhere to that rule. *Williams v. Prof'l Transp., Inc.*, 294 F.3d 607, 614 (4th Cir. 2002).

ii. The Second, Fifth, Sixth, Eighth, and Ninth Circuits have adopted an intermediate position under which generally – with some variation between the courts of appeals – a party may receive an award of attorneys' fees based on bad faith misconduct that is related to the course of the litigation, although that misconduct *need not* have occurred in the lawsuit *itself*. These courts would hold that the court has the power to award attorneys' fees in this case because the government's misconduct compelled petitioner to pursue its claims administratively and in the Court of Federal Claims.

The Fifth Circuit rejects both the position that fees are narrowly available only for bad faith in the conduct of the court proceedings, as well as the opposite rule that fees broadly may be awarded purely for bad faith conduct giving rise to the claim. That court instead has adopted the middle ground position that "the requisite bad faith may be found in a party's conduct *in response* to a substantive claim,

whether before or after an action is filed, but it may not be based on a party's conduct *forming the basis* for that substantive claim." *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (emphases in original).

Under that standard, the Fifth Circuit notably holds that governmental misconduct in the administrative process may be a basis for an award of attorneys' fees. Thus, in *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992), the court held that on remand the district court was empowered to award attorneys' fees against the government when "(1) the INS used inappropriate factors to adjudicate requests for relief; (2) the INS retaliated against class members through deportation proceedings; and (3) the INS failed to timely adjudicate requests for relief after promising to change this policy." Similarly, in *Baker v. Bowen*, 839 F.2d 1075, 1082 (5th Cir. 1988), in which a plaintiff sought Social Security benefits, the Fifth Circuit held that the administrative "Appeals Council failed to fulfill [its] statutory duty when it affirmed the ALJ, perfunctorily and automatically, without reviewing all the evidence," and that the plaintiff was entitled to attorneys' fees because had the appeals council fulfilled "its duty, there would have been no litigation in this case." *Ibid.*

The Second Circuit has expressly adopted the Fifth Circuit's holding. The Second Circuit holds that "the point at which a complaint is filed does not mark the line between conduct that may or may not be considered in awarding fees for bad faith." *Kerin v. USPS*, 218 F.3d 185, 195 (2d Cir. 2000). In *Kerin*, for example, the court held that an attorneys' fees award was available based on the allegation that the

government had refused to recognize a valid claim and thereby forced the plaintiff to litigate. *Id.* at 195-96.

The Eighth Circuit adopted the same rule in *McLarty v. United States*, 6 F.3d 545, 549 (8th Cir. 1993). That court has further specified that if the "bad faith" of a party "necessitat[ed] that an action be filed," attorneys' fees are available. *Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997) (discussing *Richardson v. Commc'ns. Wkrs.*, 530 F.2d 126, 132 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976)). It is similarly sufficient that a party had brought a frivolous claim in bad faith. *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990). There is in fact authority in the Eighth Circuit supporting application of the D.C. Circuit's broad rule that fees are available for conduct that underlies the plaintiff's cause of action. *U.S. SEC v. Zahareas*, 374 F.3d 624, 627 (8th Cir. 2004) (award of attorneys' fees is not limited merely to cases involving bad faith conduct "in connection with the litigation," but is also available for bad faith that "was an aspect of the conduct giving rise to the lawsuit").

The Ninth Circuit has held that a party generally may not recover fees "solely upon a finding of bad faith as an element of the cause of action presented in the underlying suit," *Ass'n of Flight Attendants v. Horizon Air Indus.*, 976 F.2d 541, 550 (9th Cir. 1992), but it has squarely held that misconduct in an administrative review process will justify an award of fees. Thus, in *Brown v. Sullivan*, 916 F.2d 492, 496 (9th Cir. 1990), an administrative law judge awarded the plaintiff disability benefits. That ruling was

automatically subject to administrative review before an Appeals Council, which reversed without the benefit of a transcript and without providing certain evidence to the plaintiff. The Ninth Circuit held that this bad faith conduct by the government entitled the plaintiff to attorneys' fees, reasoning that the government's conduct violated the "process for review of benefit allowances," which is "statutorily defined." *Ibid.* That misconduct "created delays and necessitated [the plaintiff's] filing the first action in the district court." *Ibid.*

Finally, the Sixth Circuit applies yet a different rule that is distinctly more stringent. That court holds that fees are not available for bad faith giving rise to the plaintiff's claim; conversely, although the basis for a fee award is not limited to litigation misconduct, "the bad faith exception does not apply where there is no bad faith *after* the original claim arises." *Shimman v. Int'l Union of Oper. Eng'rs*, 744 F.2d 1226, 1232 (6th Cir. 1984) (en banc) (emphasis added). The pervasive circuit conflict over the question presented is illustrated by the fact that the D.C. Circuit has expressly rejected the Sixth Circuit's more stringent position. *See Nepera*, 794 F.2d at 701 n.102.

c. In sum, the eligibility of a party for an award of attorneys' fees for the bad faith misconduct of its opponent outside the proceedings before the court depends entirely on the pure happenstance of the particular circuit in which the case is litigated. Eight different circuits – all of which reject the narrow rule that only bad faith conduct in the litigation itself may give rise to a fee award – would have held in this case that the government's gross misconduct could be the

basis for petitioner to recover the significant attorneys' fees it was forced to expend unnecessarily in pursuing its administrative and judicial remedies. The principal role of this Court's certiorari jurisdiction is to resolve just such conflicts, and the Court's intervention is plainly warranted.

II. The Ruling Below Conflicts with This Court's Precedents.

This Court has held under the "bad faith" exception to the "American Rule" that a federal court has the inherent power to hold a party liable for its opponent's attorneys' fees for acts done "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)). The lower courts held as a matter of law that this power applies only if the bad faith misconduct occurs before the court itself. That narrow conception of the federal courts' inherent power is unwarranted.

In *Vaughn v. Atkinson*, 369 U.S. 527 (1962), the Court held that an award of attorneys' fees was appropriate because the defendant had refused to pay the plaintiff maintenance and cure required by maritime law. The Court reasoned that the plaintiff was "forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old." *Id.* at 531.

Subsequently, in *Hall v. Cole*, 412 U.S. 1, 15 (1973), this Court held that in awarding fees "'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."

In reaching that conclusion, the Court favorably cited the Fourth Circuit's decisions awarding attorneys' fees on the basis of bad faith conduct giving rise to the plaintiff's claim, *see Bell* and *Rolax*, *supra*, describing those decisions as reflecting the "unquestioned" power of a federal court to "award counsel fees to a successful party when his opponent has acted" in bad faith. *Id.* at 5. In *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 706, 721 (1974), the Court reaffirmed "the common-law availability of an award" in such circumstances.

This Court moreover summarily affirmed an award of attorneys' fees necessitated by the Alabama legislature's efforts to avoid reapportioning voting districts as required by the Fourteenth and Fifteenth Amendments. *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). The district court reasoned that these fees were justified either because of the State's bad faith, 340 F. Supp. at 693-94, or because of "far broader considerations of equity" arising from the plaintiff's role as "private attorneys general," *id.* at 694. Subsequently, in *Alyeska*, this Court rejected the assertion that *Sims* rested on the "private attorney general" concept, explaining that "there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees." 421 U.S. at 270-71 n.46.

Even if, contrary to those precedents, the inherent power to grant fees were limited to cases of bad faith conduct before the court, petitioner would be eligible for such an award in this case. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this Court squarely held that the EAJA's attorneys' fees provisions extend to proceedings before an administrative

agency that is part of a claims-resolution process. The Court reasoned:

> Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

Id. at 888. In reaching that conclusion, the Court relied on prior decisions holding that fees were available under the Clean Air Act for "the costs of representation before federal and state administrative agencies," *id.* (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986)), as well as under Title VII "for services performed in state administrative and judicial enforcement proceedings," *id.* at 888-89 (citing *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980)).

Applied to this case, this Court's precedents provide that the government is subject to an award of attorneys' fees for violating its clear obligations by breaching its contract with petitioner and for corrupting the proceedings before the contracting officer. The Court's rulings in *Vaughn*, *Hall*, and *Sims* establish that a federal court's inherent power to award fees extends to cases in which a party is forced to institute litigation because of its opponent's purposeful violation of clear legal rights. The bad faith exception in part serves to make a party "whole

for expenses caused by his opponent's obstinacy." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

This is such a case. The government engaged in gross bad faith behavior that forced petitioner to file a claim under the Contract Disputes Act. The government then continued in its outrageous course of conduct, corrupting the statutory claims resolution process, preventing a fair adjudication by the contracting officer, and requiring petitioner to pursue its further remedies before the Court of Federal Claims.

Petitioner's eligibility for fees is all the more clear because in a case under the Contract Disputes Act the proceedings before the contracting officer are "intimately tied" with the judicial process. *Sullivan*, 490 U.S. at 888. Given the "interlocking system of judicial and administrative avenues to relief," the "exclusion" of the proceedings before the contracting officer "from the fee provisions would clearly clash with the congressional design behind the statutory scheme whose enforcement the fee-shifting provisions was designed to promote." *Id.* at 889. The design of the statutory scheme is to "equalize the bargaining power of the parties [to a government contract] when a dispute exists; . . . and insure fair and equitable treatment to contractors and government agencies." S. Rep. No. 95-1118 (Aug. 15, 1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235. Specifically, as the individual responsible for resolving disputes between contractors and the government, a contracting officer serves as a "quasi-judicial official when rendering a final decision." Cibinic et al., *supra*, at 1286. In this

role, the contracting officer's duty to provide "impartial, fair, and equitable treatment" (48 C.F.R. § 1.602-2(b) (Oct. 1, 2009)) requires that he "act impartially," not "as a representative of one of the parties" (*Penner Installation Corp. v. United States*, 116 Ct. Cl. 550, 557 (1950)).

In this case in particular, the administrative and judicial proceedings were intimately related. After petitioner was forced to institute proceedings before the Court of Federal Claims, the government willfully acted in contravention of the court's rulings. The court specifically found that the government engaged in misconduct in direct response to rulings by the court favorable to petitioner and that that malfeasance deprived petitioner of compensation to which it was entitled. *See* Pet. App. 140a-41a. Moreover, despite an absence of "adverse findings," Army officials utilized internal and criminal investigative resources to "delay resolution of this case by more than a year, during which period [they] continued to abuse [petitioner] on an almost daily basis." Pet. App. 166a. The government viewed this misconduct "as a way to support the development of defenses *in this litigation*." *Id.* 160a (emphasis added). As the Court of Federal Claims recognized, this "most pernicious form of bad faith . . . threatens the integrity of the dispute resolution process that is central to the government contracting system itself." Pet. App. 155a. The Federal Circuit's conclusion that the federal courts are powerless to sanction such a course of ongoing bad faith misconduct that occurs in the midst of, and is directly related to, judicial proceedings is meritless.

Holding the government categorically immune from an award of fees in these circumstances would furthermore conflict with Congress's "premise" in enacting the EAJA: "that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 96-1418 (Sept. 26, 1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4986-87. Congress feared that "the government, with its greater resources and expertise can in effect coerce compliance with its position." 1980 U.S.C.C.A.N. at 4988. By interposing a contracting officer as an intermediate step in the process of adjudicating disputes over government contracts, Congress did not intend to heighten the already significant inequality in resources and deter private parties from vindicating their rights against the government.

The negative consequences of the Federal Circuit's ruling for the public fisc are apparent as well. If the government is able to leverage its vast legal resources through bad faith dispute resolution, the resulting risk premium required by parties who enter into agreements with the government will necessarily increase.

Nor does the government conveniently acquire immunity from an award of fees for its pervasive bad faith misconduct because petitioner did not prevail on all of its claims before the Court of Federal Claims. In point of fact, the court ruled for petitioner on the merits of most of its allegations. Although the court disagreed with the opinion of petitioner's damages

expert, the fact that petitioner was ultimately awarded nearly $2 million in damages in the case shows that its claims were significant and meritorious.

But in any event, the fact that petitioner did not entirely prevail before the Court of Federal Claims is not relevant to its right to attorneys' fees. "A court's inherent power to award attorney's fees pursuant to the bad faith exception 'depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.'" *Lamb*, 103 F.3d at 1435 (quoting *Chambers*, 501 U.S. at 53). In this case, an award of fees is appropriate because the government's bad faith conduct deprived petitioner of the fair adjudication of its claims to which it was entitled before the contracting officer, necessitating a "significant expenditure of judicial resources" (Pet. App. 19a) in the course of petitioner's appeal.

Nor is there merit to the Court of Federal Claims' remaining suggestion (*ibid.*) that petitioner's success on the merits of its claim that the government breached the covenant of good faith and fair dealing could perversely *disentitle* petitioner to an award of attorneys' fees. There is no basis in law or logic to hold that, although a party's bad faith misconduct generally subjects it to an award of fees, that sanction must be denied whenever the plaintiff proves bad faith as an element of its substantive claim. An award of attorneys' fees vindicates the judiciary's interest in the integrity and efficiency of the legal process – including in cases in which a party in bad faith forces its opponent to institute litigation unnecessarily. In this case, the damages awarded to petitioner on its substantive claims related

exclusively to the government's breach of the parties' contract; those damages did not in any respect purport to compensate petitioner for the significant attorneys' fees that petitioner incurred as a result of the government's gross misconduct.

Because the ruling below conflicts with this Court's precedents and Congress's design in enacting the Contract Disputes Act and the EAJA, certiorari is warranted.

III. The Importance of the Question Presented Is Manifest.

This Court's intervention is finally warranted because the question presented has the potential to arise in any case litigated in federal court, whether or not the government is a party. The EAJA provides that the United States shall be liable for attorneys' fees in "any civil action brought by or against the United States . . . to the same extent that any other party would be liable under the common law or under the terms of any statute that provides for such an award." 28 U.S.C. § 2412(b). The numerous federal appellate rulings giving rise to the conflict between the circuits, *see* Part I, *supra*, demonstrates that the issue recurs with great regularity.

The importance of this case is only heightened by the fact that it arises from the Federal Circuit, which exercises exclusive jurisdiction over government contract disputes. *See* 41 U.S.C. §§ 607(g)(1)(a), 609(a)(1). The Federal Circuit's narrow conception of the court's power to award attorneys' fees is a distinctly minority view, yet it governs all contractual relationships between private parties and the government. In 2008, the government spent over

$500 billion on contracts with private individuals. *See* Memorandum for the Heads of Executive Departments and Agencies, Government Contracting, 74 Fed. Reg. 9755 (Mar. 4, 2009).

Finally, this case presents an ideal vehicle through which to resolve this circuit conflict. Petitioner is a government contractor litigating a purely federal question – the proper application of the Equal Access to Justice Act to the bad faith exception to the American Rule recognized by this Court. Accordingly, this appeal does not involve the potentially thorny terrain of applying a federal fee-shifting rule to a violation of state substantive law, which would implicate the "very different situation [that] is presented when a federal court sits in a diversity case." *Alyeska*, 421 U.S. at 259 n.31; *see also Montgomery Ward & Co. v. Pac. Indem. Co.*, 557 F.2d 51, 57 n.8 (3d Cir. 1977).

Further, the Court in this case can decide the question of law of the circumstances in which attorneys' fees are available under the bad faith exception to the American Rule without resolving whether such an award is appropriate on the facts of this particular case. The Court of Federal Claims' initial findings, subsequently reaffirmed by the court in its opinion addressing petitioner's claims to attorneys' fees, establish that the government engaged in pervasive bad faith both in the administration of the contract and the adjudication of petitioner's claim. Those findings demonstrate, at the least, that petitioner's claim to attorneys' fees is substantial. After resolving that the lower courts erred in holding as a matter of law that petitioner is categorically ineligible for an award of fees, this

Court can remand for a determination of whether an award is appropriate on the facts of this case and what portion of petitioner's fees should be awarded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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